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Supreme Court of the United States

OCTOBER TERM, 1903.

Nos. 297 and 298.

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JAMES H. McKENNEY,
Clerk.

ANDREW J. AIKENS,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

ALBERT HUEGIN,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

Supplemental Brief.

LAFAYETTE M. STURDEVANT,
Attorney General of Wisconsin.

JAMES G. FLANDERS,
Of Counsel for Defendant in Error, The State of Wisconsin.

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May it Please the Court:

At different times during the progress of these cases so much as been said and printed about the case of *Allen vs. Flood et al.* (Law. Rep. Appeal Cases, 1898, page 1) that we ask leave to have considered as a part of the brief of the defendant in error the following references to and comments upon that case. At the time the original brief on behalf of the State of Wisconsin was printed, counsel for the state was incapacitated by sickness from supervising the completion thereof. Otherwise the suggestions herewith submitted would have been incorporated in that brief:

FIRST.

The case of *Allen vs. Flood* in its facts was and is essentially different from the cases now being considered, as well as from the case of *Quinn vs. Leathem* (Law. Rep. Appeal Cases, 1901, page 495), in which *Allen vs. Flood* was discussed.

Flood and Taylor, plaintiffs below, were ship-wrights employed by the Glengall Iron Company in repairing a ship, and brought an action against Allen for maliciously and wrongfully, and with intent to injure the plaintiffs, procuring the Glengall Company to break their contract with the plaintiffs and not to enter into a new contract. Plaintiffs were members of the Boiler Makers' Society which objected to the employment of ship-wrights on iron work. Prior to their employment by the Glengall Company plaintiffs had been employed by Mills & Knight in doing iron work on a ship. The boiler makers employed by the Glengall Company, numbering about forty, having discovered that the plaintiffs had been doing such iron work became much excited and began to talk of leaving the employment of the Glengall Company. Allen was the London delegate of the Boiler Makers' Society, and, in response to a telegram from one of the boiler makers, came to the place where the plaintiffs were employed. Subsequently he had an interview with the manager and with the foreman of the Glengall Company and at the end of the same day the plaintiffs were discharged by the Glengall Company's manager. Plaintiffs then brought the action above described.

In *Quinn vs. Leathem*, the facts were as follows:

In July, 1895, the plaintiff was a dealer in meats at Lisburn, in Ireland, and had been for more than twenty years. He employed Dickie and other assistants not members of the Butchers' Union. Craig was president, Quinn, treasurer, and Davey, secretary of the Butchers' Union, and Dornan and Shaw were members of such Union. The Union insisted that plaintiff should discharge all non-union employes. Plaintiff not complying, the Union notified Munce (who had been buying meat from Leathem for about twenty years) that Munce's employes would be called out if Munce continued to buy plaintiff's beef.

Thereupon, Munce ceased to deal with the plaintiff and plaintiff was put to a great loss, a quantity of fine meat having been killed for Munce. Dickie, who had been ten years in plaintiff's employ, was called out by the Society and left in the middle of the week. Evidence was given that blacklists were issued by the Butchers' Union containing the names of tradesmen who had dealings with the plaintiff, one of whom was induced not to deal with plaintiff, but there was no evidence connecting Quinn with these lists.

It will be observed that both of these cases are civil actions while the defendants in the cases under consideration by this Court were prosecuted criminally for an offense arising under a statute of Wisconsin.

SECOND.

An inspection of the opinion in *Quinn vs. Leathem* will disclose the fact that *Allen vs. Flood*, in so far as it contains anything supporting the contention of the plaintiffs in error in the cases under consideration, has been practically overruled. We call attention to the following extracts from the opinions in *Quinn vs. Leathem*, discussing and distinguishing *Allen vs. Flood*. The italics are our own.

The Earl of Halsbury, L. C., in his opinion (pages 505 and 506) said:

"My Lords, in this case the plaintiff has by a properly framed statement of claim complained of the defendants, and proved to the satisfaction of the jury that the defendants have wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff; that the defendants did this in pursuance of a conspiracy framed among them, that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment, and that all this was done with malice in order to injure the plaintiff, and that it did injure the plaintiff. If, upon these facts so found, the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community. Nor, indeed, do I understand that anyone has doubted that before the decision

of *Allen vs. Flood* in this House such fact would have established a cause of action against the defendants." * * *

In the same case Lord Macnaghten said in his opinion (page 511):

"That a conspiracy to injure—an oppressive combination, differs widely from an invasion of civil rights by a single individual, cannot be doubted. I agree in substance with the remarks of Bowen, L. J., and Lords Bramwell and Hannan in the Mogul case (23 Q. B. D. 598, 1892, A. C. 25), 'A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbors. But it is a very different thing (as Lord Fitzgerald observes) when one man has to defend himself against many combined to do him wrong.'"

In the same case Lord Shand in his opinion said (page 513):

"This being clearly so, the question now raised is really whether, in consequence of the decision of this House in the case of *Allen vs. Flood*, and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or wrong another, and not to advance the party's own trade interests, and injury has resulted, no action will lie; or to put the question in a popular form, whether the decision in *Allen vs. Flood* has made boycotting lawful?"

In the same case, on page 515, Lord Shand said in his opinion:

"It is only necessary to add that the defendants here have no such defense as *legitimate* trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen vs. Flood*, as a case of legitimate competition in the labor market, is essentially

different and gives no ground for the defendants' argument."

In the same case, Earl of Halsbury, L. C., said in his opinion (pages 506-507):

"Now, the hypothesis of fact upon which *Allen vs. Flood* was decided by a majority of this House was that the defendant there neither uttered nor carried into effect any threat at all; he simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade union official had no authority himself to call out the men, which in that case was argued to be the threat which coerced the employers to discharge the plaintiff. *It was further an element in the decision that there was no case of conspiracy or even combination. What was alleged to be done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favor of his fellow members.* It is true that I personally did not believe that was the true view of the facts, but, as I have said, we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision."

In the same case, on page 514, Lord Shand said:

"As to the vital distinction between *Allen vs. Flood* and the present case, it may be stated in a single sentence. *In Allen vs. Flood the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors; whereas in the present case, while it is clear there was combination, the purpose of the defendants was 'to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing his own interests.'*"

And again on the same page:

"* * * The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen in what he said and did was only exercising the right of himself and his fellow workmen as competitors in the labor market, and the effect of injury thus

caused to others from such competition, which was legitimate, was not a legal wrong.

"It is only necessary to add that the defendants here have no such defense as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for the purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as injustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen vs. Flood*, as a case of legitimate competition in the labor market, is essentially different, and gives no ground for the defendants' argument."

In the same case, on page 529, Lord Brampton said in his opinion:

"I quote as a very instructive definition of a conspiracy the words of a great lawyer, Willis J., in *Mulcahy vs. Reg.*, in delivering the unanimous opinion of himself, Blackburn J., Bramwell B., Keating J. and Pigott B., which was adopted by this House: 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. * * * * The number and the compact give weight and cause danger.'

"It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made subjects of civil actions like the present.

"In 1870, Cockburn, C. J., in delivering the unanimous judgment of Channell B., Cleasby B., Keating and Brett J. J., in *Reg. vs. Warburton*, said, 'It is not necessary, in order to

constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i. e., amount to a civil wrong.'"

THIRD.

It must be apparent that in *Allen vs. Flood* there was no question whatever of conspiracy (See *Quinn vs. Leathem*, pages 532, 533); that in *Quinn vs. Leathem* a conspiracy to injure the plaintiff was charged and proved; that in the cases under consideration a conspiracy to injure The Journal Company in its trade and business was charged and admitted by the defendants (See Transcript of Record, pages 20 and 21); and that loss of advertisers as a result of such conspiracy was also admitted (See Transcript, page 21); that in *Allen vs. Flood* the act complained of was the act of an individual, and that as stated in *Quinn vs. Leathem*, on page 532, "In the opinion of the Noble Lords who formed the majority of your Lordship's House, all that Allen did was to inform the employers of the plaintiff's that most of their workmen would leave them if they did not discharge the plaintiffs."

A careful inspection of the cases referred to will doubtless be made by the Court and will disclose that *Quinn vs. Leathem* fully supports the decision of the Supreme Court of the State of Wisconsin in the cases under consideration and that *Allen vs. Flood* is not an authority in point.

Respectfully submitted,

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